



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460


OFFICE OF  
SOLID WASTE AND EMERGENCY  
RESPONSE

APR 26 2007

OSWER 9375.2-12

**MEMORANDUM**

**SUBJECT:** Directive on Paying for Remedy Repairs or Modifications during the State-Funded Period of Operation and Maintenance (O&M)

**FROM:**   
James E. Woolford, Director  
Office of Superfund Remediation and Technology Innovation (OSRTI)

**TO:** Superfund National Policy Managers (Region I – X)  
Office of Regional Counsel (Region I – X)

**PURPOSE**

The purpose of this memorandum is to transmit the final guidance entitled “Directive on Paying for Remedy Repairs or Modifications during the State Funded Period of Operation and Maintenance (O&M).”<sup>1</sup>

This Directive presents the Office of Superfund Remediation and Technology Innovation’s (OSRTI) guidance on when it may be appropriate for the Agency to pay for remedy repairs or modifications once a state has assumed responsibility for operation and maintenance (O&M) at a Fund-lead Superfund site. It also provides some factors the Regions should consider in evaluating site-specific circumstances and establishes a consultation process with OSRTI when addressing certain remedy repairs and modifications.

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<sup>1</sup> This guidance provides information to the public and to the regulated community on how EPA intends to exercise its discretion in implementing its regulations at contaminated sites. It is important to understand, however, that this document does not substitute for statutes EPA administers or their implementing regulations, nor is it a regulation itself. Thus, this document does not impose legally binding requirements on EPA, states, or the regulated community, and may not apply to a particular situation based upon the specific circumstances. Rather, the document suggests approaches that may be used at particular sites as appropriate, given site-specific circumstances. This guidance may be modified in the future.

## BACKGROUND

### Operational and Functional (O&F)

The National Oil and Hazardous Substances Pollution Contingency Plan (NCP), 40 CFR§300.435(f)(2), states, “A remedy becomes operational and functional either one year after construction is complete, or when the remedy is determined concurrently by EPA and the State to be functioning properly and is performing as designed, whichever is earlier.”

For Fund-financed remedies, the O&F milestone generally guides when the Region transfers the remedy to a state for O&M.

### Operation and Maintenance

For Fund-financed remedies, CERCLA§104(c) requires states to pay for or assure payment of all future O&M costs. Generally, prior to a Fund-financed remedial action, the state also provides its assurance in accordance with CERCLA section 104(c)(3)(A) to assume responsibility for operation and maintenance of implemented remedial actions for the expected life of such actions. The state and EPA normally consult on a plan for operation and maintenance prior to the initiation of a remedial action.

The NCP, 40 CFR§300.45(f)(1), describes O&M as the measures “initiated after the remedy has achieved the remedial action objectives and remediation goals in the ROD (Record of Decision), and is determined to be operational and functional, except for ground- or surface-water restoration actions covered under 40 CFR§300.435 (f)(4).”<sup>2</sup>

Remedies that involve O&M generally include actions that may require CERCLA§121 five-year reviews (e.g., landfill caps; gas collection systems; ground-water containment; ground- and surface-water restoration remedies, including monitored natural attenuation). A state’s O&M responsibilities generally should be designed to ensure that the remedy remains protective of human health and the environment and may include the repair and replacement of all damaged, worn and obsolete equipment and structures.<sup>3</sup> EPA uses its appropriations for oversight of a state’s O&M activities, but not for conducting actual O&M.

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<sup>2</sup> Typically, ground- and surface-water restoration remedies, including monitored natural attenuation, would go directly from remedial action into O&M upon construction of the treatment plant, monitoring system and the O&F determination. However, the NCP 40 CFR §300.435(f)(3), makes an exception for fund-financed remedies. It states that treatment or other measures to restore ground- or surface-water quality to a level that ensures protection of human health and the environment, and the operation of such treatment or other measures for a period up to ten years after the remedy becomes O&F will be considered part of the remedial action. Activities required to maintain the effectiveness of such treatment or measures following the ten-year period, or after the remedial action is complete, whichever is earlier, generally are considered O&M.

<sup>3</sup> A more complete overview and description of the O&M planning and implementation process in Superfund can be found in OSWER Directive 9200.1-37FS “Operation and Maintenance in the Superfund Program” (EPA 540-F-01-004, May 2001).

## **IMPLEMENTATION**

In certain site-specific circumstances, the Agency may determine that it is appropriate to pay or partially pay for certain repairs or modifications to operating remedies even though a state has assumed responsibility for O&M.

When evaluating whether it is appropriate for the Agency to pay some or all of the costs to repair or modify a remedy after a state has assumed responsibility for O&M, Regions should consider whether:

- A latent design or construction defect in a remedy that affects protectiveness is discovered after the construction has been completed and O&M has begun;
- A new, previously not identified contaminant of concern is discovered, which necessitates a fundamental change to the operating treatment system chosen in the Record of Decision (ROD); or
- An Applicable or Relevant and Appropriate Requirement (ARAR) change requires a more stringent cleanup level than the one established in the ROD.

If the remedy is damaged by some form of natural disaster, then the State should be prepared to make the necessary repairs. Federal disaster funds may be made available, if the area has been declared a disaster under the Stafford Act.

## **FUNDING THE REMEDY REPAIR OR MODIFICATION**

The Region may consider the use of EPA appropriations or Special Account money to pay for a repair or modification to the remedy. If the Region proposes to use Fund money, priority funding generally will be given to all remedy repairs or modifications with a total cost of \$250,000 or less; remedy repairs or modifications costing in excess of \$250,000 generally will be subject to National Risk-Based Priority Panel review and approval. The Remedial Project Manager (RPM) should ensure that funding for any remedy repair or modification is coordinated with the state with regard to its cost share.

## **HEADQUARTERS CONSULTATION**

If a Region determines that it may be appropriate for the Agency to pay for remedy repairs or modifications after a State has assumed responsibility for O&M, the Region must consult with the Director of the Assessment and Remediation Division, OSRTI. Information requested for the consultation with OSRTI is provided below.

The documentation provided by the Region should:

1. Provide a brief background and description of the site;
2. Identify the type of remedy(ies) to be repaired or modified, the reason the repair or modification is necessary, and the estimated cost and timeframe to repair or modify

the remedy;

3. Discuss the rationale for using the Fund or Special Account money to make the needed remedy repair or modification; and
4. Identify the proposed decision document to be used to document the repair or modification.

This information should be sent to the Chief of the appropriate Regional Support Branch in the Assessment and Remediation Division (ARD) of OSRTI. The information will be reviewed by the ARD Director and appropriate Branch Chief. The purpose of this review is to determine whether the proposed remedy repair or modification warrants the expenditure of Fund or Special Account money. If the Region requests the use of Special Account funds to accomplish the repair or modification to the remedy, the Office of Site Remediation Enforcement (OSRE) may also be asked to review the site documentation submitted by the Region.

Upon completion of ARD's review, the findings will be provided to the RPM and Regional management. If the ARD Director concurs with the Region's request to repair or modify the remedy, the Region should document the action in an Explanation of Significant Differences (ESD), as an amendment to the ROD, or in a letter to the file, as appropriate.

For questions regarding this Directive, please contact Rafael Gonzalez at 703-603-8892 or David Lopez at 703-603-8707.

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